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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, CROSS-PETITIONER

v.

FOLDING CARTON RESERVE FUND, ET AL.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the United States may be estopped from enforcing the final mandate of a court of appeals which provides, in accordance with 28 U.S.C. 2042, that certain unclaimed settlement funds are to be deposited in the federal Treasury "in the name and to the credit of" the United States.

PARTIES TO THE PROCEEDINGS

Petitioner, which filed a motion to intervene in the district court and was appellant in the court of appeals, is the United States. Respondents are the Folding Carton Reserve Fund and the parties in the court of appeals. Those parties are the Certified Plaintiff Class in MDL-250,* represented by class representatives Beatrice Companies, G. Heileman Brewing Co., Grist Mill Co., Land O'Lakes, Inc., Cumberland Farm Dairies, Inc., and Pantry Pride Enterprises, Inc. (which were the plaintiffs in the district court and appellees in the court of appeals); the Anheuser Busch Companies, Inc. (which was a party in the court of appeals); and the Folding Carton Administration Committee (which was created by the district court to act on its behalf in settlement distributions and in the court of appeals and filed a brief on behalf of the district court in the court of appeals).

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* The plaintiff class consists of the following:

All persons in the United States (excluding defendants, their subsidiaries, affiliates, or agents), who purchased folding cartons from any of the defendants in these actions during the period from January 1, 1960 to December 31, 1974.

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The Solicitor General, on behalf of the United States, respectfully cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, 89-927 Pet. App. 1b-22b, is reported at 881 F.2d 494. The opinion of the district court, 89-927 Pet. App. 1j-30j, is reported at 687 F. Supp. 1223.

JURISDICTION

The judgment of the court of appeals, 89-927 Pet. App. 1a-3a, was entered on September 11, 1989. A petition for rehearing was denied on September 15, 1989. 89-927 Pet. App. 1e-2e. A petition for a writ of mandamus or prohibition or, in the alternative, for a writ of certiorari was filed

in No. 89-927 on December 11, 1989, and was received by the United States on that date. Petitions for a writ of certiorari were filed in No. 89-992 and No. 89-1081 on December 11, 1989, and were received by the United States on January 3, 1990, and January 2, 1990, respectively. This cross-petition for a writ of certiorari is being filed pursuant to Rule 12.3 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 2041 provides:

> All moneys paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in such court, shall be forthwith deposited with the Treasurer of the United States or a designated depositary, in the name and to the credit of such court.
>
> This section shall not prevent the delivery of any such money to the rightful owners upon security, according to agreement of parties, under the direction of the court.

2. 28 U.S.C. 2042 provides:

> No money deposited under section 2041 of this title shall be withdrawn except by order of court.
>
> In every case in which the right to withdraw money deposited in court under section 2041 has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, such court shall cause such money to be deposited in the Treasury in the name and to the credit of the United States. Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him.

STATEMENT OF THE CASE

The facts of this case are set forth in detail in the United States' brief in opposition in No. 89-927, No. 89-992 and No. 89-1081. The jurisdiction of the district court was based on 28 U.S.C. 1331 and 28 U.S.C. 1337.

REASONS FOR GRANTING THE CROSS-PETITION

As explained in the United States' brief in opposition in No. 89-927, No. 89-992 and No. 89-1081, this is a novel case whose result depends heavily on the peculiar procedural history of this litigation. For that reason, among others, the United States believes that the most prudent course for this Court is to decline review of the court of appeals' decision altogether.

If this Court is inclined to review the court of appeals' decision, however, that review should encompass the court of appeals' ruling that the United States is estopped from enforcing the court of appeals' own prior mandate regarding the disposition of the reserve fund, a mandate that rests directly on 28 U.S.C. 2042. The court of appeals' estoppel ruling is fundamentally flawed, and because that ruling underlies the court of appeals' disposition of this case, meaningful review of the decision below necessitates inclusion of the estoppel ruling.

1. For reasons set forth in detail in the government's submissions to this Court in *Office of Personnel Management* v. *Richmond*, cert. granted, No. 88-1943 (Oct. 2, 1989), the doctrine of equitable estoppel should not be applied against the United States. First, the federal government may not be estopped from enforcing the public laws because Congress has not waived the sovereign immunity of the United States to the assertion of estoppel claims. Second, to give the force of law to misstatements by Executive Branch officials, in contravention of statutory provisions enacted by Congress and signed into law by the President,

would violate basic principles of separation of powers. Third, estopping the government from enforcing the laws disserves the public interest by creating uncontrolled and potentially enormous claims on the public fisc, by fueling litigation characterized by problems of proof, and by inviting fraud or collusion by public officials. For these reasons, challenges to government actions founded upon estoppel should not be entertained absent express authorization by Congress.[1] Although this case concerns the United States' attempt to enforce a court of appeals' mandate, rather than a public law, the mandate itself simply gives effect to an explicit statutory provision. The fact that the statutory obligation does not stand alone, but has instead been incorporated into a lawful judicial order, simply reinforces the case against estopping the United States.

2. Even if this Court's decision in *Richmond* were to leave open the possibility of estoppel against the United States in some cases, estoppel would not be appropriate here.

a. To establish equitable estoppel against a private party, a litigant must show that it reasonably relied on the conduct of that party and that it "did not know nor should it have known" the true facts. *Wisconsin Winnebago Business Committee* v. *Koberstein*, 762 F.2d 613, 620 (7th Cir. 1985). Here, no party can satisfy this test, because the lack of settlement authority on the part of the U.S. Attorney's Office is clearly set out in the Code of Federal Regulations. See 28 C.F.R. 0.160(a)(2), 0.161, 0.168(a), and Appendix to Subpt Y, § 1(c)(2).[2] The parties who wish to settle this

[1] Copies of our briefs in *Richmond* have been provided to the other parties in this case.

[2] Although the court of appeals did not resolve the applicability of these regulations, the court suggested that they might not apply because "the government had no unconditional right of ownership" to the surplus funds under Section 2042. 89-927 Pet. App. 12b. The

multi-million dollar matter, represented by sophisticated legal counsel, can hardly claim that they should not reasonably have known about these regulations or been charged with the duty to look them up.

Similarly, the settling parties cannot claim that they reasonably relied on *oral* statements from officials in the U.S. Attorney's Office to settle a multi-million dollar legal dispute when the settlement they proposed plainly violated the court of appeals' direction that the funds be deposited in the U.S. Treasury.[3] Indeed, the parties' failure to obtain *any* written approval of the settlement from *any* representative of the United States under these circumstances totally defeats an assertion of reasonable reliance. See *Heckler* v. *Community Health Services, Inc.*, 467 U.S. 51, 65 (1984) ("The appropriateness of respondent's reliance is further undermined because the advice it received * * * was oral."); *Schweiker* v. *Hansen*, 450 U.S. 785, 788-789 n.4 (1981); see also *Tennessee* v. *Dole*, 749 F.2d 331, 337-338 (6th Cir. 1984) (no estoppel based on conversation with an Assistant Attorney General), cert. denied, 472 U.S. 1018 (1985).

Nor can the claimants who received windfall payments under the settlement assert an estoppel. Both the district

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observation that Section 2042 does not vest the United States with an "unconditional" right of ownership is correct but irrelevant. The departmental regulations in question apply to all "money claims against the United States," 28 C.F.R. 0.160(a)(2); whether the government's interest in the property is conditional or unconditional is of no consequence under the terms of the regulations. It is undisputed that the court of appeals' original mandate vested the United States with *some* interest in the funds; thus, any settlement that purports to dispose of that interest is governed by the regulations.

[3] The district court itself noted the possible problem at a March 27, 1985, hearing, explaining that one of the participants asked whether the district court had jurisdiction to approve the settlement, given the court of appeals' prior ruling, and the district court stated that "that has been a matter of concern." Gov't C.A. App. 26.

court and the court of appeals had held that previously-paid claimants, because they had already been compensated for their antitrust injuries, had no legal or equitable rights to any portion of the reserve fund. Therefore, those claimants would be trying to use estoppel to retain possession of funds which they had no right to receive but for the government's error. This Court has barred estoppel in that very circumstance. See *Community Health Services*, 467 U.S. at 62-63.[4]

b. Even if the elements of estoppel applicable to private parties were satisfied in this case, the fact that no government official engaged in affirmative misconduct precludes application of an estoppel against the United States. This Court has made clear that prejudice is not synonymous with affirmative misconduct and that a finding of prejudice without more does not justify estopping the government. See, *e.g.*, *Montana* v. *Kennedy*, 366 U.S. 308 (1961) (plaintiff deprived of opportunity to become a citizen and deported as an alien); *Federal Crop Insurance Co.* v. *Merrill*, 332 U.S. 380 (1947) (entire season's crop lost with no insurance). As the Court held in *Hansen*, 450 U.S. at 790, erroneous advice from a governmental official falls "far short of conduct which would raise a serious question whether petitioner is estopped from insisting upon compliance with the valid regulation." Thus, the incorrect oral statements made by officials of the U.S. Attorney's Office do not constitute affirmative misconduct. For that reason alone, equitable estoppel is inappropriate here.

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[4] It would also be difficult for the litigants to establish any cognizable injury from their reliance on the U.S. Attorney's Office's oral statements. Even if that reliance caused the district court and litigants to withdraw their requests for this Court's review of the court of appeals' ruling, there was a very slim chance of such review being granted, and an even lower likelihood that the challenged judgment would have been reversed, as indicated by the court of appeals when it denied a motion to stay its original mandate. See Gov't C.A. App. 16-17.

Far from responding to these points, the court of appeals' opinion fails altogether to address them. At no point did the court explain why the traditional requirements of estoppel were satisfied or what acts of the U.S. Attorney's Office constituted affirmative misconduct. 89-927 Pet. App. 13b-14b. In the end, the court's estoppel ruling is little more than an *ipse dixit*. For the reasons given above, that ruling is not simply unsupported but incorrect as well.

3. If the Court agrees that the United States may not be estopped from enforcing 28 U.S.C. 2042 and the court of appeals' mandate, then the judgment below should be reversed and the reserve fund should be deposited in the U.S. Treasury "in the name and to the credit of the United States." In its original decision, the court of appeals explained that "Section 2042 applies directly to the case before us" and that the order directing the surplus funds to "escheat" to the United States "merely implements a direct Congressional mandate for the disposition of residual funds deposited with a district court." *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252, 1259 (7th Cir. 1984). Accordingly, the settlement agreements in this case violated not only the court's original mandate, but also 28 U.S.C. 2042. The court of appeals itself recognized that the agreements are "not in keeping with the mandate of this court." 89-927 Pet. App. 6b. Because the court's mandate is designed to implement 28 U.S.C. 2042, and because the settlement agreements are at odds with the mandate, reversal of the court of appeals' estoppel ruling requires that the reserve fund be returned to the federal Treasury.

This result applies not just to the half of the reserve fund granted to law schools for research (which the court of appeals overturned), but also to the half of the reserve fund paid to those members of the plaintiff class who already had received compensation under prior distributions (which the court of appeals let stand). 89-927 Pet. App. 14b. With

respect to the latter half of the fund, the court of appeals reasoned that the "additional distribution to class claimants * * * is no longer a concern to this court in view of our holding that the United States has no remaining interest in the Reserve Fund, but it would be quite to the contrary if the interest given the government remained." 89-927 Pet. App. 14b. Because the distribution to class claimants was permissible only because the United States' interest in the funds had been forfeited by estoppel, reversal of the estoppel ruling requires recovery of that distribution.[5]

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[5] The Court can grant this cross-petition and review the court of appeals' estoppel ruling without having to address whether the United States was entitled to intervene in the district court as a party under Fed. R. Civ. P. 24(a). Although we believe that the district court and the court of appeals erred in disallowing intervention, the government's party status or lack thereof is rendered academic by Fed. R. Civ. P. 71. Rule 71 provides that "[w]hen an order is made in favor of a person who is not a party to the action," the person "may enforce obedience to the order by the same process as if a party * * *." Because the court of appeals' original mandate, which directed the surplus funds to be deposited in the Treasury "in the name and to the credit of the United States," 28 U.S.C. 2042, was plainly "made in favor of" the United States, Rule 71 authorizes the United States to seek enforcement of the mandate as if it were a party. Accordingly, this cross-petition may be granted without addressing the issue of intervention.

Of course, the presence of the United States as a party makes it unnecessary for this Court to reach the issues raised in No. 89-927, No. 89-992 and No. 89-1081. The government's objection to the settlement reached by the parties presents a clear case or controversy under Article III.

CONCLUSION

If the Court is inclined to review the judgement of the United States Court of Appeals for the Seventh Circuit below, then this cross-petition, the petition for a writ of mandamus or prohibition or, in the alternative, for a writ of certiorari in No. 89-927, and the petitions for a writ of certiorari No. 89-992 and No. 89-1081, should be held pending the Court's decision in *Office of Personnel Management* v. *Richmond*, cert. granted, No. 88-1943. This case should then be disposed of in a manner consistent with the Court's decision in *Richmond*.

Respectfully submitted.

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